No. 90-1908

Supreme Court, U.S.
FILED
JUN 14 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CEDAR BROOK SERVICE STATION, INC., M. SCHWEIGHARDT, d/b/a C & S AUTOMOTIVE II, ROBERT KELLER GULF, d/b/a MOBO PETRO CORP., P & G GRIPPO INC., AUTO TECH SERVICE-CENTER INC., SPELMAN ENTERPRISES INC., ROCCO GENTILLELA, d/b/a/ CENTRAL SERVICE STATION, JAMES MARIANI, d/b/a J. & J. GULF SERVICE STATION, PLAINVIEW GULF, INC., WILLIAM STUREK, d/b/a BILL'S CENTER MORICHES GULF & DISCO COUNTY CORP.,

Petitioners,

v.

CHEVRON U.S.A., INC., and CUMBERLAND FARMS INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JERRY S. COHEN
COHEN, MILSTEIN,
HAUSFELD & TOLL
1401 New York Avenue, N.W.
Washington, D.C. 20005
Tel: 202/628-3500

ARNOLD P. AZAROW
825 East Gate Boulevard
Garden City, New York 11530
Tel: 516/222-2282

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Can a major petroleum refiner (Chevron U.S.A. Inc.) withdraw from the retail marketing of gasoline in the Northeastern United States by selling all of its marketing assets and assigning all of its franchise interests to a convenience food chain (Cumberland Farms, Inc.) and escape the market withdrawal provisions of the Federal statute (Petroleum Marketing Practices Act), which specifically is designed to protect the interests of gasoline dealers involved in such a withdrawal, by treating it as a State law assignment?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
PROCEEDINGS BELOW	2
JURISDICTION	3
STATUTORY PROVISIONS	4
STATEMENT OF THE CASE	8
REASONS FOR GRANTING THE WRIT	12
CONCLUSION	32
APPENDIX A	1A
APPENDIX B	9A
APPENDIX C	11A
APPENDIX D	35A

TABLE OF AUTHORITIES

Cases:	Page
Abadjian v. Gulf Oil Corp., 602 F. Supp. 874 (C.D. Cal. 1984)	24
Ackley v. Gulf Oil Corp., 726 F. Supp. 353 (D. Conn. 1989), aff'd, 889 F.2d 1280 (2d Cir. 1989) (per curiam), cert. denied, 110 S. Ct. 1811, 108 L. Ed. 2d 941 (1990)	12-13, 31
Amato v. Western Union International, Inc., 773 F.2d 1402 (2d Cir. 1985)	31
American Radio Relay League v. FCC, 617 F.2d 875 (D.C. Cir. 1980). .	31
Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc. and Chevron U.S.A., Inc., appeal pending, Nos. 1772, 1773, 2017 (1st Cir. 1991)	17 n.3
Concomo-Flores v. I.N.S., 805 F.2d 60 (2d Cir. 1986).	31
Statutes:	
Petroleum Marketing Practices Act, 15 U.S.C. §§2801-2806:	
Section 2801(3)	8
Section 2802(b)(1).	4, 18

Section 2802(b)(2)(E) . . . . passim
Section 2802(b)(2)(E)(ii). . 6, 19
Section 2802(b)(2)(E)(iii). . passim
Section 2805(a) 10
Section 2806(b) . . . . . passim

28 U.S.C. §1254(1) 3
28 U.S.C. §1331 9

Legislative Materials:

Hearings on H.R. 130, Before Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 95-51 (1977) 27

U.S. Code Cong. & Admin. News 873, 876 26

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1990

No.

CEDAR BROOK SERVICE STATION, INC., M. SCHWEIGHARDT, d/b/a C & S AUTOMOTIVE II, ROBERT KELLER GULF, d/b/a MOBO PETRO CORP., P & G GRIPPO INC., AUTO TECH SERVICE-CENTER INC., SPELMAN ENTERPRISES INC., ROCCO GENTILLELA, d/b/a J. & J. GULF SERVICE STATION, PLAINVIEW GULF INC., WILLIAM STUREK, d/b/a BILL'S CENTER MORICHES GULF & DISCO COUNTY CORP.,

Petitioners,

v.

CHEVRON U.S.A., INC., and CUMBERLAND FARMS INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioners Cedar Brook Service Station, Inc., et al.[1] respectfully pray that a Writ of Certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Second Circuit.

PROCEEDINGS BELOW

Petitioners appeal the Order entered by the United States Court of Appeals for the Second Circuit on February 5, 1991 (Appendix A) and the subsequent denial of the timely Petition for Rehearing and Suggestion for Rehearing en banc which was denied by Order entered on March 19, 1991 (Appendix B). The Court of Appeals affirmed the judgment of the Honorable Eugene H. Nickerson of the United States District Court for the Eastern District of New York entered on August 20, 1990 granting Respondents' Motion for Summary

---

[1] Pursuant to Supreme Court Rule 29.1, Petitioners do not have any parent or subsidiary companies.

Judgment pursuant to Federal Rules of Civil Procedure 56, 746 F. Supp. 278 (E.D.N.Y. 1990) (Appendix C). The decision of Judge Nickerson, in turn, reconsidered and vacated a prior decision by the Honorable Mark A. Costantino, U.S. District Court for the Eastern District of New York, entered on June 5, 1989. Judge Costantino had denied Respondents' motions for summary judgment finding that a triable issue of fact existed as to Respondents' compliance with the requirements of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§2801-2806 (Appendix D).

JURISDICTION

The final Order of the Court of Appeals denying Petitioners' Petition for Rehearing and Suggestion for Rehearing en banc was denied on March 19, 1991. The jurisdiction of this Court is invoked under §28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Petroleum Marketing Practices Act, 15 USC §§2801-2806 ("PMPA"). The pertinent portions are:

> 15 U.S.C. §2802. Franchise relationship
>
> General prohibition against termination or nonrenewal
> (a) Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may -
>
> > (1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or
> >
> > (2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

15 U.S.C. §2802(b)(1) and §2802(b)(2)(E):

> Precondition and grounds for termination or nonrenewal
>
> (b)(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail

to renew any franchise relationship, if -

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraphs (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

[(A) - (D)]

(E) In the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term of which is three years or longer, or with respect to which the franchisee was offered a term of three years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if -

(i) such determination -

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises-

(I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days' duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer or assignment to

such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

15 U.S.C. §2806:

Relationship of statutory provisions to State and local laws

(a) to the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with repect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as

the applicable provision of this subchapter.

(b) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

STATEMENT OF THE CASE

Petitioners are eleven Gulf dealers who operate Gulf-branded service stations pursuant to a franchise which authorizes them to occupy leased marketing premises and sell motor fuel under the Gulf trademark. They lease their respective places of business from the "franchisor," who also supplies them with the product.

In 1984, Chevron U.S.A., Inc. ("Chevron") acquired Gulf and by this acquisition, became the Petitioners' "franchisor," as that term is defined in the PMPA, 15 U.S.C. §2801(3). On

December 19, 1985, Chevron sold its marketing assets in the Northeast geographic area of the United States to Cumberland Farms, Inc. ("Cumberland"). The locations where the Petitioner dealers conduct their respective businesses were purchased by Cumberland as a result of this transaction. Chevron also assigned to Cumberland the exclusive right to use and to authorize the use of the Gulf trademark and brand name.

This action was commenced on December 18, 1986 in the United States District Court for the Eastern District of New York. Federal jurisdiction was obtained pursuant to 28 U.S.C. §1331. The statute at issue is the Petroleum Marketing Practices Act, 15 U.S.C. §§2801-2806. The relationship between parties to a petroleum marketing franchise is governed by the PMPA. The PMPA provides for district court

jurisdiction of questions involving failure to comply with its requirements. 15 U.S.C. §2805(a).

Petitioners contend that Chevron's withdrawal from the relevant geographic market area by virtue of its sale of Gulf's marketing assets and the transfer of the authority to use the Gulf trademark to Cumberland constituted a terminaton of their franchise relationship with Chevron, and a nonrenewal by Chevron of their respective franchises, at the end of their terms.

Petitioners further allege that the transaction between Chevron and Cumberland was an improper withdrawal from the relevant geographic market area because it was not accomplished in accordance with the provisions of §2802(b)(2)(E). A lawful market withdrawal requires that the withdrawing franchisor (Chevron) either offer to sell

the marketing premises to the dealer or, if assigned to a person other than the franchisor, that the assignee offer to the dealer, in good faith, a nondiscriminatory franchise. Petitioners claim that the franchises offered by Cumberland after the sale and assignment were, in fact, discriminatory. 15 U.S.C. §2802(b)(2)(E)(iii)(II).

Petitioners seek the right to purchase their marketing premises on the same basis and at the same price as such premises were purchased by Cumberland and seek monetary damages resulting from both Chevron's unlawful termination and/or nonrenewal of their franchises and the losses resulting from the discriminatory franchises offered by Cumberland.

Chevron asserts that its withdrawal from the relevant geographic area does not involve a termination or nonrenewal that is subject to the PMPA because its

obligations as a franchisor have been transferred to Cumberland.

The Second Circuit Court of Appeals, on the basis of its previous decision in Ackley v. Gulf Oil Corp., 726 F. Supp. 353 (D. Conn. 1989), aff'd, 889 F.2d 1280 (2d Cir. 1989)(per curiam), cert. denied, 110 S. Ct. 1811, 108 L. Ed. 2d 941 (1990), found that Chevron's sale to Cumberland was a valid assignment under state law and, therefore, did not result in a termination or nonrenewal which would trigger the PMPA's protective provisions.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

In its decision, the Second Circuit affirmed the Summary Judgment granted

defendants in the District Court by reference to Ackley v. Gulf Oil Corp., 889 F.2d 1280 (2d Cir. 1989)(per curiam), cert. denied, 110 S. Ct. 1811 (1990). In its opinion, the Court held simply that if there is an assignment of a franchise properly effected under state law, there cannot be a termination or nonrenewal under the Petroleum Marketing Practices Act, stating that:

> In Ackley, we agreed with the district court's determination that an "invalid assignment" of the PMPA franchise [is what] triggers the PMPA protections. Ackley, 726 F. Supp. at 361.

Per Curiam Opinion of Second Circuit, February 5, 1991, at 7A.

The result is that by so ruling, the Second Circuit has finessed and rendered a nullity the entire section of the PMPA which encompasses the withdrawal by a petroleum marketer from a relevant

geographic market area.[2] (Section 2802(b)(2)(E))(hereinafter "market withdrawal section"). It has done so with neither analysis nor discussion of the purpose and plain language of the market withdrawal section involved.

The PMPA became law in June, 1978. Its principal purpose is to provide for the protection of franchised retailers of motor fuel who utilize the trademarks of major refiners. One of its major components is its section dealing with withdrawal from a relevant geographic area by a franchisor marketer of gasoline accomplished by the sale, transfer or assignment of its market premises in such geographic market area.

The market withdrawal section has become one of the most significant

---

[2] The provisions of the PMPA can be triggered only by a termination or nonrenewal of a franchise or franchise relationship.

aspects of the statute as a result of the merger of major petroleum companies in recent years, take-overs, and restructurings of markets wherein refiners are consolidating their presence in certain geographic areas and selling off their assets in others. The result is fewer and fewer refiners in each market area. This process continues to accelerate and has become one of the most serious problems facing gasoline dealers who have a franchise relationship with their refiner/suppliers.

This lessening of competing refiners is an issue affecting all consumers utilizing motor fuel and the price they pay for gasoline.

This section of the PMPA, therefore, directly impacts on national energy policy, which in turn directly affects the national interest. Therefore, the issue in this case deserves a serious and

comprehensive evaluation and analysis by this Court, rather than being decided on the basis of a prior Second Circuit per curiam decision based on a district court opinion where the basis legal issues involved were never raised.

The key facts are not disputed. Respondent Chevron totally withdrew from the geographic market involved -- the Northeastern United States, sold all its marketing assets there to Respondent Cumberland, and announced that rather than renewing its franchise relationship or its franchise agreements with plaintiffs, it would assign those agreements to Cumberland, which it did.

The issue is straightforward: Has the market withdrawal section of the PMPA, 15 U.S.C. §2802(b)(2)(E), which provides an affirmative defense for franchisors withdrawing from a geographic market, been nullified by 15 U.S.C.

§2806(b), which refers to the law of the states in determining the validity of assignments.

The answer to this question depends upon whether the actual withdrawal requires Chevron to comply with the appropriate withdrawal provisions of the PMPA. Whether or not compliance is necessary, in turn, depends on whether there was a "termination or nonrenewal" of Respondent's franchise relationship with Petitioners pursuant to the PMPA.

In a June 5, 1989 Opinion, Judge Costantino held as a matter of law that there was a nonrenewal or termination.[3]

---

[3] The District Court Judge in Chestnut Hill Gulf Inc., v. Cumberland Farms, Inc. and Chevron U.S.A., Inc., appeal pending, Nos. 1772, 1773, 2017 (1st Cir. 1991), a case based on the same withdrawal but with different dealers, agreed with Judge Costantino and allowed the case to go to trial. At trial, the jury found in favor of the plaintiffs. This same issue, among others, was

(continued...)

Judge Nickerson, to whom the case was later assigned, set aside Judge Costantino's decision and granted summary judgment to defendants on the ground that because the assignments were valid under State law, there was no termination or nonrenewal.

Petitioners submit that the reasoning and decision of Judge Costantino was correct and that the decision of Judge Nickerson was contrary to law.

The Petroleum Marketing Practices Act generally prohibits terminations and nonrenewals. However, the statute establishes affirmative defenses as an exception to the general rule. 15 U.S.C. §2802(b)(1). One such affirmative defense is market withdrawal. The

---

[3](...continued)
appealed to the First Circuit where oral arguments have been held but no decision has yet been rendered.

pertinent provisions of the withdrawal section, 15 U.S.C. §2802(b)(2)(E), are:

> (E) In the case of any franchise...a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if --
>
> (i) such determination --
>
> (I) was made after the date such franchise was entered into or renewed, and
>
> (II) was based upon the occurrence of changes in relevant facts and circumstances after such date;
>
> (ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and
>
> (iii) in the case of lease marketing premises --
>
> (I) The franchisor, during the 180-day period after notification was given pursuant to section 104, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or,

> if applicable, offered the franchisee a right of first refusal of at least 45 days' duration, of an offer, made by another, to purchase such franchisor's interest in such premises; or
>
> (II) In the case of the sale, transfer, or assignment to another such person of the franchisor's interest in such premises in connection with the sale, transfer or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor. 15 U.S.C. §2802(b)(2)(E).

A reading of the plain language of the statute demonstrates that a market withdrawal by its very nature involves a termination or nonrenewal of the franchise relationship.

In Subsection (E) the withdrawal section is made applicable to a

"determination made by the franchisor in good faith and in the normal course of business 'to withdraw' from the marketing of motor fuel through retail outlets in the relevant geographic market area..."

(E)(ii) and (iii) set forth additional requirements which must be met in addition to the requirements of "good faith" and in the "normal course of business" contained in (E).

(E)(ii) provides:

> the termination or nonrenewal is not for the purpose of converting the premises...

It is clear that Congress here is utilizing the phrase "the termination or nonrenewal" synonymously and interchangeably with "to withdraw" in (E). The intent of the statute is contained in its clear language. A market withdrawal as contemplated by the PMPA is, by definition, a nonrenewal or termination with the existing franchisor,

and it is the nonrenewal of that franchise relationship which triggers the market withdrawal provision.

The Affirmative Defense Provisions further reinforce the position that a withdrawal automatically triggers a nonrenewal.

Subsection (E)(iii) provides that to withdraw from the market, (I) the franchisor must either give the franchisee the right of first refusal or (II) the franchisor "may sell, transfer or assign" its interest in the premises to another entity if certain subsequent requirements are met. None of the requirements which follow and are necessary for a transfer or assignment include or reference a valid assignment under State law as referred to in 15 U.S.C. §2806(b).

As Judge Costantino stated:

> Chevron withdrew from marketing

through retail outlets in the entire Northeast by its own admission. Indeed, the market withdrawal provision of the PMPA is an explicit affirmative defense to a termination or non-renewal. If Chevron is correct that it completely withdrew from retail marketing in the Northeast, then clearly its relationship with the plaintiffs was, or will be, non-renewed...The fact that plaintiffs were granted continued use of the Gulf trademark and protected in their lease and supply agreements goes only to the legality of Chevron's market withdrawal under New York State law and Section 2802(b)(2)(E), and not to the issue of whether non-renewal occurred in the first place.

Opinion of District Court Judge Costantino, June 5, 1989, at 52A and 53A.

The Court further stated:

Section 2806(b) of the PMPA, which states that "[n]othing in this subchapter authorizes...or prohibits any transfer or assignment of any franchise as authorized by...any applicable provision of state law," does not, as defendants argue, compel a contrary conclusion. This section should be read not to alter the meaning of "non-renewal" of a franchise relationship, but rather to indicate the applicability of state law to franchise assignments. Defendants cannot be heard to argue that state law validity exempts a transaction from the terms of the PMPA when 2802(b)(2)(E)(iii)(II) explicitly provides that grounds for non-renewal

exist "[i]n the case of ...assignment to another person of the franchisor's intrest...if such other person offers..." Id. (emphasis added). Supra, at 55A, 56A.

Judge Costantino concluded:

> The PMPA does not pre-empt state law on the issue of valid assignment, as 2806(b) plainly states. But the PMPA divorces the issue of assignability from that of proper nonrenewal in 2802(b)(2)(E)(iii)(II), which imposes conditions for legal non-renewal following an assignment. Supra, at 56A.

This issue also arose in Abadjian v. Gulf Oil Corp., 602 F. Supp. 874, 881 (C.D. Cal. 1984), where the Court held that to treat a market withdrawal as an assignment under Section 2806(b), rather than require compliance with the provisions of Section 2802(b)(2)(E) where a market withdrawal had in fact taken place, would result in the complete circumvention of the Act.

15 U.S.C. §2806(b), the Assignment Provision, provides:

> (b) Nothing in this title

> authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

Judge Nickerson (and the Second Circuit agreed) ruled that if there is a valid assignment under State law, there can be no failure to renew or terminate. Specifically, he held:

> The provisions of 15 U.S.C. §2806(b) make it clear that the mere making of an assignment valid under state law does not accomplish a "termination" of the franchise or "failure to renew" the franchise relationship. That section provides, in pertinent part, that "nothing" in the Act "prohibits any transfer or assignment of any franchise" as authorized by the franchise or by state law. It is fatuous to suppose that legislation including this provision had as its purpose to make every assignment of a franchise a "termination" or "failure to renew."

Opinion of District Court Judge Nickerson, at 25A, 26A.

That this reason has been used to shield a franchisor from the application

of the withdrawal section is not without a measure of irony.

This section was intended for the benefit of franchisees, not franchisors. The need arose because in June, 1978 when the PMPA became law, franchise agreements, referred to in the Senate report on the PMPA as "contracts of adhesion" (see 1978 U.S. Code, Cong. & Admin. News 873, 876) generally prohibited a franchisee from assigning its interest in the franchise, although there was no such restriction on the franchisor.

Indeed, Congress did not address in the legislative history the issue of the franchisor assigning the franchise. Rather, the issue arose solely in the context of franchisors attempting to restrict franchisees' rights to assign their franchise despite state law to the contrary.

In the words of the principal sponsor and drafter of the PMPA, Congressman John Dingell:

> The Chair would like to begin by commenting on this matter of assignability. The language regarding assignability was included after some franchisors or refiners sought to address this issue in H.R. 130, the markup, by precluding assignability by State law.

Hearings on H.R. 130 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 95-51 (1977), at 232. (emphasis added).

On this issue the hearing record on H.R. 130 reveals only a refiner/franchisor proposal by Gulf to restrict or eliminate a franchisee's right to assign his franchise (see, e.g., Hearings on H.R. 130 Before the Comm. on Interstate and Foreign Commerce of the House Comm., 95th Cong., 1st Sess. 95-51 (1977) at 218-225 (Statement of Douglas G. Linn, Vice President of Gulf Oil, Petroleum Marketing Practices)). However, not a word appears in the record

concerning franchisor assignments. The compromise position, leaving the question to state law, was designed to benefit franchisees in accordance with the overall purpose of the PMPA as set out by Congressman Dingell.

The preemption section, therefore, is not relevant to a proper analysis of this case.

Finally, the plain terms of subsection 15 U.S.C. §2802(b)(2)(E)(iii)(II) provide that the new purchaser of the premises must give a non-discriminatory franchise to its new dealers based on the franchises then currently being offered by the new purchasers or franchises the new purchaser has in effect with other franchisees.

In other words, an assignment of the seller's franchise is irrelevant because the purchaser is under a statutory

obligation to offer to its new dealer a franchise which it is already offering to others or already has in effect with its other dealers. This presumes that the seller's franchise can no longer be in effect -- it is either nonrenewed or terminated.

The withdrawal provision, moreover, in no way refers or is related to an assignment of a franchise or of an interest in a franchise relationship by the withdrawing sellers. Rather, it is focused only on the sale, transfer or assignment of premises, and when those premises are sold, transferred or assigned, if the dealer is not given the right of first refusal, then the person to whom the premises are sold or assigned must offer its own franchise to the dealers.

Therefore, there is by the terms of the section itself a nonrenewal or

termination if the marketing premises are sold or assigned regardless of what happens to the existing franchise or franchise relationship. The section presumes there has been a nonrenewal or termination when a petroleum marketer withdraws from the relevant market, and, therefore, the provisions of the market withdrawal section must be met for the withdrawal to be lawful.

Petitioner respectfully suggests that the market withdrawal provision means exactly what it says and that it cannot be nullified by applying another section dealing only with the assignment of franchises under state law. A franchisor withdrawing from a market should not be allowed to escape the provisions of the market withdrawl section simply by assigning its franchise to the same person who purchases the premises.

The Second Circuit's decision, therefore, frustrates the purpose of the statute and the intent of Congress by making the withdrawal section a nullity. Yet, the law is clear that: "[a] statute should be construed in such a way as to make all of its provisions meaningful." See, American Radio Relay League v. FCC, 617 F.2d 875, 879 (D.C. Cir. 1980); Concomo-Flores v. I.N.S., 805 F.2d 60, 66 (2d Cir. 1986); Amato v. Western Union International, Inc., 773 F.2d 1402, 1408 (2d Cir. 1985).

At the very least, it is important that this Court take a hard look at the issues raised in the Court below based on the legal questions which were raised therein and not based on the entirely different legal questions which another plaintiffs' counsel chose to raise in Ackley.

CONCLUSION

The Petiton for a Writ of Certiorari should be granted.

Respectfully Submitted,

Jerry S. Cohen
COHEN, MILSTEIN,
HAUSFELD & TOLL
1401 New York Avenue, N.W.
Washington, D.C. 20005
Tel: 202/628-3500

Arnold P. Azarow
825 East Gate Boulevard
Garden City, New York 11530
Tel: 516/222-2282

Attorneys for Petitioners

Dated: June 14, 1991

APPENDICES

APPENDIX A

RJM

EDNY
86-cv-4240
NICKERSON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of February, one thousand nine Hundred and ninety one.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. ROGER J. MINER,
HON. J. DANIEL MAHONEY,
Circuit Judges.

CEDAR BROOK SERVICE STATION, INC., M. SCHWEIGHARDT d/b/a C & S AUTOMOTIVE II, ROBERT KELLER GULF d/b/a/ MOBO PETRO CORP., P & G GRIPPO INC., AUTO TECH SERVICE-CENTER INC., SPELMAN ENTERPRISES INC., ROCCO GENTILLELA d/b/a CENTRAL SERVICE STATION, JAMES MARIANI d/b/a J. & J. GULF SERVICE STATION; PLAINVIEW GULF INC., WILLIAM STUREK d/b/a BILL'S CENTER MORICHES GULF & DISCO COUNTY CORP.,

Plaintiffs-Appellants,

v.

ORDER
90-7835

CHEVRON U.S.A., INC., and CUMBERLAND FARMS INC.,

Defendant-Appellees.

UPON CONSIDERATION of this appeal from a judgment entered in the United States District Court for the Eastern District of New York (Nickerson, J.), it is hereby

ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is affirmed.

Plaintiffs-appellants Cedar Brook Service Station Inc., M. Schweighardt d/b/a C & S Automotive II, Robert Keller Gulf d/b/a Mobo Petro Corp., P & G Grippo Inc., Auto Tech Service-Center Inc., Spelman Enterprises Inc., Rocco Gentillela d/b/a Central Service Station, James Mariani d/b/a J. & J. Gulf Service Station, Plainview Gulf Inc., William Sturek d/b/a Bill's Center Moriches Gulf &Disco County Corp., franchise[d gasoline dealers ("Dealers"), appeal from a summary judgment in favor of defendants-appellants Chevron U.S.A., Inc., ("Chevron") and Cumberland Farms, Inc.

("Cumberland"). In the district court, Judge Nickerson determined that the dealers were not entitled to the protections of the Petroleum Marketing Practices Act ("PMPA") because Chevron's withdrawal from the relevant geographic market did not result in a termination or nonrenewal of the franchise relationship.

This action is one of several involving claims by dealers of PMPA protections arising from Chevron's sale to Cumberland of all of Chevron's fuel marketing assets in the Northeast and in Ohio. See, e.g., Ackley v. Gulf Oil Corp., 726 F. Supp. 353 (D. Conn. 1989) (Connecticut franchises), aff'd, 889 F.2d 1280 (2d Cir.) (per curiam), cert. denied, 110 S. Ct. 1881 (1990); see May-Som Gulf Inc. v. Chevron U.S.A., Inc., 869 F.2d 917 (6th Cir. 1989) (Ohio franchises). In the Chevron-Cumberland Asset Purchase Agreement ("Purchase

Agreement"), all of Chevron's contractual commitments were to be assumed by Cumberland, including Chevron's dealer leases and supply agreements. Chevron granted Cumberland exclusive use of the "Gulf" trademark for a period of 15 1/2 years at no royalty, with the option to renew the license indefinitely for an annual royalty of $1 million. Chevron also transferred to Cumberland all of its credit card contracts and accounts receivable. The sale was structured to protect the continuity of dealer leases and supply contracts under the Gulf and Chevron trademarks.

The dealers brought an action against Chevron and Cumberland to set aside the sale as violative of the PMPA, 15 U.S.C. § 2801 et seq. The Dealers assert that because Chevron actually withdrew from the northeast regional market, Chevron was required under the PMPA to provide

the Dealers with the opportunity to purchase the stations leased by them from Chevron. 15 U.S.C. § 2802(b)(2)(E)(iii)(I). In an Opinion dated June 5, 1989, Judge Costantino held that the sale from Chevron to Cumberland resulted in a nonrenewal of the franchise relationship between Chevron and the Dealers, regardless of whether the franchises were validly assigned to Cumberland.

This Court rendered its decision in Ackley v. Gulf Oil Corp., 889 F.2d 1280 (2d Cir.)(per curiam), cert. denied, 110 S. Ct. 1811 (1990), just prior to the time the case was reassigned to Judge Nickerson. In Ackley, a case similar to the case at bar, we affirmed the district court's determination that Chevron's sale of its marketing assets to Cumberland did not result in a termination or nonrenewal of the Dealer's franchise agreements

which would trigger the PMPA protective provisions. Id. at 1281. Relying on this Court's decision in Ackley, Judge Nickerson granted the renewed motions of Chevron and Cumberland for summary judgment.

On appeal, the Dealers reassert that because Chevron actually withdrew from the geographic market by its sale and transfer of its marketing assets to Cumberland, there was a termination or nonrenewal of the franchise relationship. Because we have held that an assignment of a franchise, properly effected under state law, does not constitute a termination or nonrenewal under PMPA, the Dealers' arguments must fail. Ackley, 889 F.2d at 128; see May-Som Gulf, Inc. v. Chevron U.S.A., Inc., 869 F.2d 917 (6th Cir. 1989); Fresher v. Shell Oil

Co., 846 F.2d 45 (9th Cir. 1988); Barnes v. Gulf Oil Corp., 795 F.2d 358 (4th Cir. 1986).

In Ackley, we agreed with the district court's determination that an "invalid assignment of the PMPA franchise [is what] triggers the PMPA protections. Ackley, 726 F. Supp. at 361. Thus, Chevron's sale of its assets to Cumberland would trigger the PMPA protections only if the Dealers could show that the franchise assignment was not valid under state law or could establish a loss of the right to use the refiner's trademark or the loss of the motor fuel supply contract and service station leases. Id. at 360-61. Ackley is controlling here.

The district court found that Chevron's assignment to Cumberland fully complied with New York state law. As

previously noted, the undisputed facts show that the Dealers' franchises remained fully in effect after the sale. Because the Dealers failed to demonstrate "specific facts showing that there [was] a genuine issue for trial," Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (emphasis in original), with respect to whether there was an invalid franchise assignment under state law, summary judgment was appropriate.

ELLSWORTH A. VAN GRAAFEILAND,

ROGER J. MINER,

J. DANIEL MAHONEY,

Circuit Judges.

N.B. This summary order shall not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 19th day of March, one thousand nine hundred and ninety-one.

CEDAR BROOK SERVICE STATION, INC.; M. SCHWEIGHARDT, doing business as C & S Automotive II; ROBERT KELLER GULF, doing business as Mobo Petro Corp; P & G GRIPPO, INC.; AUTO TECH SERVICE-CENTER INC.; SPELMAN ENTERPRISES INC.; ROCCO GENTILLELA, doing business as Central Service Station; JAMES MARIANI, doing business as J. & J Gulf Service Station; PLAINVIEW GULF INC.; WILLIAM STUREK, doing business as Bills'Center Moriches Gulf & Disco County Corp.,

Plaintiffs-Appellants, Docket No. 90-7835

v.

CHEVRON USA, INC. and CUMBERLAND FARMS, INC.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in

banc having been filed herein by counsel for the

Appellants CEDAR BROOK SERVICE STATION INC., ET AL.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion or rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon. Chief Judge Oakes recused himself from consideration of the in banc suggestion.

Elaine B. Goldsmith,

Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

CEDAR BROOK SERVICE STATION, INC., et al.,

Plaintiffs,

-against-

CHEVRON U.S.A., INC., and CUMBERLAND FARMS, INC.,

Defendants.

----------X

86 C 4240

MEMORANDUM AND ORDER

NICKERSON, District Judge:

In 1986, defendant Chevron U.S.A. Inc. ("Chevron") sold its United States northeast regional motor fuel properties, including service stations and related contracts and leases to defendant Cumberland Farms Inc. ("Cumberland"). Plaintiffs, eleven New York service station dealers, brought this action against Chevron and Cumberland to set aside the sale as violative of the Petroleum Marketing Practices Act, 15

U.S.C. § 2801 et seq. (hereinafter the "Act") and of New York law, asserting that under the Act plaintiffs are entitled to an opportunity to purchase the stations they leased under their franchise agreements.

Citing recent federal court decisions, defendants move to reconsider Judge Costantino's decision denying them summary judgment in a Memorandum and Order of June 5, 1989, ("Cedar Brook I"), familiarity with which is assumed.

Background

This is one of various suits challenging Chevron's sale to Cumberland of various motor fuel marketing assets Chevron had acquired from the Gulf Corporation in 1984. The history of that takeover and of the decision to sell those assets is more fully detailed in Cedar Brook I.

The sale transferred to Cumberland almost five hundred service station properties, as well as gasoline distribution terminals, warehouses, associated inventories, accounts receivable, and other properties, together with Chevron's supply agreements with jobbers and service station dealers, including plaintiffs.

Under the asset purchase agreement Cumberland assumed all of Chevron's contractual commitments, including its leases to service station dealers such as plaintiffs, and related supply agreements. As franchise agreements came up for renewal, Cumberland was obligated to offer, in good faith, a new franchise to each dealer on non-discriminatory terms and conditions, in accordance with the Act.

To ensure that the "Gulf" trademark remained available to Gulf dealers,

Chevron granted Cumberland exclusive use of the trademark in the northeast United States for 15 1/2 years at no royalty, with an option to renew indefinitely for $1,000,000 per year. Chevron also transferred its northeast Gulf and Chevron credit card systems, and agreed to sell Cumberland virtually the entire gasoline output of Chevron's Philadelphia refinery. This agreement, extended in 1987, continues on a year-to-year basis.

By letter dated February 14, 1986, Chevron notified all affected Gulf and Chevron dealers of the sale, which closed on May 31, 1986. That letter advised each dealer that Chevron did not believe that the sale to Cumberland triggered the Act or represented a termination or nonrenewal of the dealer's contract of sale, service station lease and related agreements with Chevron. The letter assured the dealers that they would

retain all of their rights under the Act against Cumberland Farms.

The letter went on to recite that, on the chance that someone might later claim that the transfer involved a termination or nonrenewal subject to the Act, Chevron was taking the precaution of giving formal notice of nonrenewal of dealer agreements in accordance with the Act, although "in fact" the agreements with Chevron would continue in effect and would be renewed by Cumberland.

At the time of the sale plaintiffs were leasing their stations and purchasing gasoline from Chevron under product supply agreements for resale under the Gulf trademark. After the sale plaintiffs continued to do business under their service station leases, using the Gulf trademark, buying gasoline at the same prices as they had from Chevron. As each dealer lease expires, Cumberland

offers a new lease which contains a seven percent increase over the previous rent plus increases in applicable property taxes. Seven plaintiffs have signed new leases with Cumberland.

Plaintiffs claim that the sale resulted in the termination or nonrenewal of their franchises in violation of the Act. The Act provides that no franchisor may "terminate any franchise" or "fail to renew any franchise relationship" except under the conditions enumerated in the Act. 15 U.S.C. § 2802(a).

Defendants contend that there has been no such termination or failure to renew within the meaning of the Act, arguing that the assignment did not affect the statutory rights of the franchisees and that there was no constructive termination of the franchise by reason of an assignment invalid under state law.

Alternatively, defendants say that even if the assignment be deemed a termination of the franchises, defendants complied with the market withdrawal provisions of 15 U.S.C. § 2808(b)(2)(E), reciting the conditions under which a franchisor withdrawing from a regional market may decline to renew a franchise relationship.

Standard of Review

As plaintiffs point out, Cedar Brook I is now "law of the case." Generally, once a court decides a rule of law, that decision should govern the same issues in later stages of the case. Arizona v. California, 460 U.S. 605, 618 (1983). But this is no more than a sensible practice in the judge's discretion, and does not prohibit the court from correcting error. See id. Where circumstances warrant the court may reconsider. See Dictograph Products Co.

v. Sonotone Corp. 230 F.2d 131. 134 (2d Cir.) cert. dismissed, 352, U.S. 883 (1956).

Such circumstances exist here. Since the argument of Cedar Brook I, two circuit courts have ruled on the issue of whether the Act applies to an assignment in cases involving either the assignment from Chevron to Cumberland, see Ackley v. Gulf Oil Corp., 889 F.2d 1280 (2d Cir. 1989), aff'g 726 F.Supp. 3581 (D. Conn.), cert. denied, No. 89-1339 (U.S. Apr. 16, 1990) (1990 WL 20436), or one identical in its terms, see May-Som Gulf, Inc. v. Chevron U.S.A., Inc., 869 F.2d 917 (6th Cir. 1989). In light of these decisions, the District of New Jersey has recently reconsidered and changed its decision in another case involving this transaction cited in Cedar Brook I. See Florham Park Chevron, Inc. v. Chevron U.S.A., Inc., No. 86-4748, 86-5107, opinion at --

(D.N.J. May 4, 1990 (hereinafter Florham Park III.).

The court thus considers it appropriate to entertain defendants' renewed motion for summary judgment. It may grant summary judgment if "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The burden of so showing rests on the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). The court resolves all ambiguities and draws all reasonable inferences in favor of the party opposing the motion. Donohue v. Windsor Locks Board of Fire Commissioners, 834 F.2d 54, 57 (2d Cir. 1987).

Applicability of the Act

The overriding purpose of the Act was to protect franchisees from "arbitrary and discriminatory terminations or nonrenewals of their franchises." S.Rep. No. 731, 95th Cong., 2d Sess. 15,

reprinted in 1978 U.S. Code Cong. & Admin. News 873, 874 (hereinafter Senate Report). To this end, the Act prohibits franchisors from terminating a franchise or not renewing a franchise relationship except under specific enumerated conditions. See 15 U.S.C. § 2802(b).

In order to establish a claim under the Act, a franchisee must prove either a termination of the franchise or nonrenewal of the franchise relationship. "Franchise relationship" is defined in the statute as "the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise." 15 U.S.C. § 2801(2).

Cedar Brook I rejected defendants' argument that there was no termination or nonrenewal of the franchise relationship because Cumberland completely assumed

Chevron's obligations. The court distinguished the term "franchise relationship" as defined in the Act at 15 U.S.C. § 2801(2) from the same term as used in § 2802(b)(2)(A). Citing the Senate Report at page 30, the court in Cedar Brook I read that term as used in § 2802(b)(2) to mean "the relationship between the parties rather than the specific rights or obligations of the parties under the franchise agreement." Cedar Brook I, memorandum at 11 (emphasis added in opinion). The court considered Chevron's withdrawal from retail marketing constituted a nonrenewal of the "relationship", even though plaintiffs were afforded continued protection of their franchise rights. Id. at 11--12.

On reconsideration, an examination of the legislative history persuades this

court that it does not supply this conclusion. The relevant passage is as follows:

> In connection with the nonrenewal provisions of the title,...[t]he term [franchise relationship] is utilized for two reasons. First, in the renewal context, the contract which constitutes the franchise may no longer exist and the term "franchise relationship" is utilized to avoid any contention that because the "franchise" does not exist there is nothing to renew. The renewal provisions of the title address the renewal of the relationship between the parties rather than the specific rights or obligations of the parties under the franchise agreement. Second, because the title contemplates changes in the specific provisions of the franchise agreement at the time of renewal, the title requires renewal of the relationship between the parties as distinguished from a continuation or extension of the specific provisions of the franchise agreement. Use of the narrow term "franchise" in this context could raise unintended questions regarding the ability of the franchisor to comply with the renewal obligations of the title by offering a franchise agreement which differs in any particular from the expiring franchise.

Senate Report at 30. In other words, the

term "franchise relationship" signifies more than the provisions of a particular expiring franchise agreement. Thus, the franchisor in renewing the franchise need not offer terms identical to those in an expiring franchise, provided, of course, that the basic franchise relationship is maintained. By the same token, the franchisor cannot put off the franchisee's request to renew until the franchise has expired and then claim there is no franchise to renew.

But this court does not read the Senate Report to suggest that the franchise relationship must exist only between the same "parties", so that no assignment by the franchisor is valid. The language of the Senate Report is entirely consistent with the statutory definition in 15 U.S.C. § 2801(2) of the "franchise relationship" as the respective "motor fuel marketing or

distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under franchise."

The Act in 15 U.S.C. § 2801(1) defines a "franchise" in terms of three elements, namely, a contract to use the refiner's trademark, a contract for supply of fuel to be sold under the mark, and a lease of premises for sale of the fuel. See Barnes v. Gulf Oil Corp., 795 F.2d 358, 360 (4th Cir. 1986). So long as the franchisee retains the right to enforce these obligations and responsibilities, there has been no failure to renew the franchise relationship. The fact that these obligations and responsibilities have been assumed by some one other than the franchisor does not mean there is no franchise.

Plaintiffs have neither alleged nor presented evidence that the assignment

compromised any of the three elements defined by the Act to constitute plaintiffs' "franchisees". Cumberland purchased the stations leased by plaintiffs, who continue to occupy them under either the terms of their leases with Chevron or renewal leases. Cumberland acquired the right to use the Gulf trademark with an option to renew indefinitely. Plaintiffs conduct their business under the Gulf trademark, with the benefit of the Gulf and Chevron credit card system. Plaintiffs continue to purchase Gulf brand gasoline, with supply still guaranteed from Chevron's Philadelphia refinery and Cumberland's other sources.

The provisions of 15 U.S.C. § 2806(b) make it clear that the mere making of an assignment valid under state law does not accomplish a "termination" of the franchise "failure to renew" the

franchise relationship. That section provides, in pertinent part, that "nothing" in the Act "prohibits any transfer or assignment of any franchise" as authorized by the franchise or by state law. It is fatuous to suppose that legislation including this provision had as its purpose to make every assignment of a franchise a "termination" or "failure to renew."

Of course, the assignee, in this case Cumberland, is not as a result of the assignment free to flout the Act. Should Cumberland terminate a franchise or fail to renew a franchise relationship, plaintiffs retain their statutory rights.

Moreover, the terms of the Act suggest that Congress did not design it to prohibit petroleum companies from making all large scale assignments of assets such as the one at issue. May-Som Gulf 869 F.2d at 921-22; Florham Park III,

opinion at 10; Russo v. Texaco, Inc., 630 F.Supp. 682, 683 (E.D.N.Y. 1986).

This court concludes that, provided the assignment is valid under applicable state law, the Act does not make the assignment a termination of a franchise or a failure to renew a franchise relationship.

The United States District Court for the District of Connecticut reached the same result in Ackley v. Gulf Oil Corp., 726 F.Supp. 353 (D. Conn. 1989) (hereinafter "Ackley") and the Court of Appeals affirmed "substantially" for the reasons given by the District Court. Ackley v. Gulf Oil Corp., 889 F.2d 1280 (2d Cir. 1989), cert. denied, No. 89-1339 (U.S. April 16, 1990) (1990 WL 20436). Similar holdings were made in May-Som Gulf and Florham Park III.

An assignment invalid under state law may be regarded as a constructive

termination under the Act. Such a purported assignment might infringe the franchisee's rights under the Act. See Barnes v. Gulf Oil Corp., 795 F.2d 358, 363 (4th Cir. 1986). But plaintiffs have not alleged illegality under New York law. New York permits assignment of contractual rights and delegation of contractual duties, except where the contract calls for personal services, or prohibits assignment, or where assignment materially alters the rights and duties of the other party. Smith v. Craig, 211 N.Y. 456, 461, 105 N.E. 798 (1914). Plaintiffs have not argued any such exception applies to their leases and supply agreements.

A lease agreement, such as the service station leases here, is freely assignable incidental to the sale of the leased property, absent some restriction in the lease. Reltron Corp. v. Voxakis

Enterprises, 57 A.D.2d 134, 137-8, 395 N.Y.S.2d 276, 279 (4th Dep't 1977). Plaintiffs allege no such restriction.

The element of plaintiffs' franchises that comprises the supply agreements for gasoline is governed by New York's version of section 2-210 of the Uniform Commercial Code, which provides in relevant part:

> (1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. (...)
>
> (2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance.

N.Y.U.C.C. § 2-210.

As noted above, plaintiffs have neither alleged that Chevron's duties

under the supply agreements were personal nor non-delegable by agreement. See May-Som Gulf, 869 F.2d at 924. Nor have plaintiffs' provided any evidence that the assignment has materially changed their duties, increased their burdens, or impaired their chance of receiving return performance.

Plaintiffs have alleged that (1) Cumberland is more interested in maximizing the value of its acquired real estate than in maintaining unprofitable stations, and has converted several stations not involved in this suit into convenience food stores; (2) Cumberland's president opined he would change or drop the Gulf trademark if by doing so he could sell more gasoline; (3) the gasoline pricing formula for Cumberland-operated stations is different and historically somewhat lower than that used for dealer-operated stations; (4)

the new franchise leases give Cumberland the right of first refusal if a franchisee wishes to assign his franchise, and involve higher rents than the old franchises; and (5) some stations have used a combined Cumberland-Gulf logo.

These and similar allegations have been considered and found wanting by the courts in the supervening decisions of Ackley, May-Som Gulf, and Florham Park III. Missing from the present record is any evidence that these circumstances have harmed or may harm the plaintiffs. To the extent that they are speculative, such allegations are insufficient to raise an issue of material fact. Ackley, 726 F.Supp. at 363. As mentioned above, should Cumberland wilfully terminate the Gulf trademark, or improperly terminate

plaintiffs' leases, plaintiffs at that moment will have a claim under the Act. Id.

Changes made by Cumberland that were within Chevron's prerogative to make are likewise insufficient to show a burden or impairment flowing from the assignment at issue. The franchise agreements establish no fixed or comparative price of gasoline to be sold to dealers. See Ackley, 726 F.Supp. at 364, May-Som Gulf, 869 F.2d at 924. Changes that Cumberland subsequently instituted in renewal leases are not relevant to the question whether the initial assignment materially increased plaintiffs' burdens or risks. Ancillary issues concerning Cumberland's supposed deficiencies in support services, such as training, advertising, or promotion, are likewise irrelevant as plaintiffs have shown no contractual right to these services. They are not

part of a franchise under the Act. May-Som Gulf, 869 F.2d at 925. The court finds plaintiffs' other arguments without merit for the reasons given in Ackley and May-Som Gulf. Plaintiffs have failed to raise an issue of material fact as to whether the assignment violated either plaintiffs' franchises under the Act or New York law.

The court need not address defendants' alternative argument that they have complied with the market withdrawal provisions of the Act.

State Law Claim

No federal issue remains. The court therefore declines to consider the pendent claim under New York's General Business Law. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139 (1966).

Conclusion

The court's order of June 5, 1989 is vacated and defendants' motion for summary judgment is granted.

So ordered.

Dated: Brooklyn, New York
August 13, 1991

Eugene H. Nickerson,
U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

CEDAR BROOK SERVICE STATION, INC., et al.,

86 C 4240

Plaintiffs,

-against-

CHEVRON U.S.A., INC., and CUMBERLAND FARMS, INC.,

Defendants.
----------X

COSTANTINO, District Judge:

BACKGROUND

In 1984 Chevron U.S.A. Inc., ("Chevron") acquired the Gulf Corp., ("Gulf"). Under the terms of a consent order between Chevron and the Federal Trade Commission (the "Hold Separate Order"), Chevron was required to operate the Gulf assets separately from its own, exercising no direction or control over them until Chevron divested itself of certain Gulf assets. Prior to the March

13, 1985 termination of the "Hold Separate Order", Chevron was permitted access to Gulf's business records to the extent necessary to complete the required divestitures.

As a result of the Gulf acquisition, Chevron's aggregate debt exceeded $15 billion. To reduce this debt, Chevron initiated market studies to identify which of its assets (either acquired from Gulf or held by Chevron prior to the Gulf purchase) it could most profitably sell.

Upon termination of the "Hold Separate Order" a study team was created within Chevron for the specific task of further evaluating the possible sale of Chevron's Philadelphia refinery and its marketing assets in a number of Northeast and Mid-Atlantic States. The study team solicited bids for these assets, informing the prospective buyers that no decision had been made to sell any

particular assets and informing them that authority to approve any sale rested not with the team, but with Chevron's Board of Directors.

On September 20, 1985, Chevron sent prospective purchasers specific bidding instructions and a draft sale agreement. The bidding instructions stated that Chevron could reject any and all bids, and that if Chevron's Board of Directors tentatively decided to accept a bid, final approval would be subject to the negotiation and execution of a binding purchase and sale agreement.

On November 7, 1985, Chevron's Board tentatively accepted a bid from Cumberland Farms, Inc. ("Cumberland") for Chevron's motor fuel marketing assets in the ten Northeast states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, New Jersey and Delaware.

Chevron has retained its Philadelphia refinery and the marketing assets in the mid-atlantic states of Virginia and Maryland, as well as the District of Columbia.

On December 19, 1985, Chevron and Cumberland signed an asset purchase agreement which covered petroleum product distribution terminals, warehouses, office locations, trucks and other vehicles, 494 service station properties and all associated inventories and accounts receivable. In addition, the sale transferred to Cumberland supply contracts with approximately 300 Gulf and Chevron branded "Jobbers" (who maintain storage tanks and trucks for the sale of petroleum products to Gulf and Chevron branded service stations), more than 400 lessee service station dealers and 900 service station dealers who own their own stations.

In structuring the sale, Chevron took numerous steps to minimize disruption to the ongoing Gulf and Chevron dealer operations. These steps included requiring Cumberland, by the terms of the Asset Purchase Agreement, to assume all of Chevron's contractual commitments, including its dealer leases and supply agreements. Further, as franchise agreements came up for renewal, Cumberland was required to offer, in good faith, a new franchise to each dealer on terms and conditions which were not discriminatory.

To ensure that the "Gulf" trademark remained available to Gulf dealers, Chevron granted Cumberland exclusive use of the trademark at Northeast stations for 15 1/2 years with an option to renew indefinitely. Provisions were also made to protect the value of the Gulf and Chevron credit card systems, and Chevron

agreed to sell Cumberland virtually the entire gasoline output of its Philadelphia refinery.

On November 8, 1985, Chevron notified all Gulf and Chevron dealers in the Northeast that it was entering final sale negotiations with Cumberland.

On February 14, 1986, Chevron notified all Gulf and Chevron dealers affected by the sale that it would not renew their franchises, but had assigned its rights and delegated its duties to Cumberland, which would honor the provisions of all agreements and offer nondiscriminatory franchise renewal agreements upon expiration of each dealer's current agreements with Chevron. The sale closed on May 31, 1985.

Plaintiffs, 11 service station dealers in New York, were leasing their stations from defendant Chevron at the time of the sale to defendant Cumberland. Each

plaintiff also purchased its gasoline from Chevron under product supply agreements for resale under the Gulf trademark.

Plaintiffs claim that the Northeast sale violated the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 et seq (1982) (PMPA) as well as New York law, and seek to have the sale set aside and be afforded the chance to purchase from Chevron the stations they were leasing under their franchise agreements.

The PMPA was enacted to protect dealers, who are generally small business persons, from arbitrary termination or non-renewal of their franchise relationships with powerful refiners. Senate Report No. 95-297, 95th Cong., 2d Sess. (1978) defines the term franchise as a "motor fuel trademark license." It further provides that "[s]econdary arrangements, such as leases of real

property or motor fuel supply agreements, are incorporated in the definition of a franchise [so that the Act] may not be circumvented by a termination or non-renewal of the real estate lease or motor fuel supply agreement which thereby renders the trademark license valueless." Id. at 29.

Thus to achieve its protective function, the PMPA "prohibits a franchisor from terminating a franchise during the term of the franchise agreement and from failing to renew the relationship at the expiration of the franchise term, unless the termination or non-renewal is based upon a upon a ground specified or described in the legislation ...." Id. at 15. Section 2805(c) of the PMPA provides that "[i]n any action...the franchisee shall have the

burden of proving the termination of the franchise or the non-renewal of the franchise relationship."

Plaintiffs claim that the Northeast transaction resulted in non-renewal of their franchises under the PMPA as a matter of law, and that defendants are collaterally estopped from claiming otherwise by Florham Park Chevron, Inc. v. Chevron, 2 Bus. Franchise Guide (CCH) ¶ 9011 (D.N.J. 1987) (Florham Park I). Defendants have filed a motion for summary judgment, arguing that the PMPA expressly permits assignments of franchise agreements from one franchisor to another which, if valid under state law, do not invoke the PMPA at all. Because the assignments of plaintiffs' franchise agreements were valid under New York law, defendants contend, no termination or non-renewal occurred and no cause of action under the PMPA arose.

Defendants also claim that even if they did trigger the PMPA by their transaction, they fully complied with the affirmative defense set forth in § 2802(b)(2)(E) of the PMPA, which permits termination or non-renewal of a franchise relationship where a franchisor withdraws from a marketing area if certain conditions are met.[1] Plaintiffs take issue with numerous aspects of defendants' claim that the terms of 2802(b)(2) were met. Initially, they argue that factual issues, unsuitable for disposition on summary judgment exist regarding Chevron's "good faith determination" to withdraw from the Northeast.

Second, plaintiffs claim that there occurred no "changes in relevant facts and circumstances" to justify the decision to withdraw.

Third, plaintiffs contend that the issue of Cumberland's good faith in offering non-discriminatory renewal franchises is inappropriate for summary judgment and that defendants are collaterally estopped by Florham Park Chevron, Inc. v. Chevron, 2 Bus. Franchise Guide (CCH) ¶ 9012 (D.N.J. 1987) (Florham Park II) from arguing to the contrary. Even if defendants are not estopped, say plaintiffs, factual issues exist regarding Cumberland's good faith that require consideration by a jury.

Fourth, plaintiffs note, and defendants agree, that Cumberland was not a "franchisor" at the time of the sale. Plaintiffs claim this fact made it impossible -- at least as to the first dealer whose franchise with Chevron expired following the sale -- for Cumberland to satisfy the requirement of 2802(b)(2)(e)(iii)(II) that it offer the

franchisees new franchises "which are not discriminatory to the franchisee[s] as compared to franchises then currently being offered" or "then in effect and with respect to which such other person is the franchisor."

Defendants argue that the PMPA does not mandate that only existing franchisors may purchase the interests of a withdrawing franchisor. To hold that it did amount to a restraint of trade which would stratify the market place and limit the flexibility of withdrawing franchisors in contravention of congressional intent. Finally, plaintiffs' claim that defendant, Cumberland Farms violated § 199.b of the NYS GBL by failing to make disclosures required there under. Cumberland claims that all disclosures were either made or unnecessary.

DISCUSSION

A) Did the Northeast transaction invoke the PMPA?

Defendants argue that they are entitled to summary judgment because the sale of properties of Chevron to Cumberland was neither a termination nor a non-renewal and therefore could not give rise to a cause of action under the PMPA. Defendants first point out that the PMPA seeks to protect franchisees from arbitrary termination or non-renewal while also allowing "any transfer or assignment of any franchise as authorized by ... any applicable provision of state law." Brief for Defendant Chevron at 14, Cedar Brook Service Station, Inc., et al. v. Chevron U.S.A. Inc., et al., (quoting 15 U.S.C. § 2806(b)(1982).

Plaintiffs presently occupy the same stations under their original leases or renewal leases with Cumberland, purchase

Gulf gasoline under original or renewal leases and do business under the Gulf trademark. These protections, defendants argue, coupled with the fact that New York State permits the assignment of contractual rights and obligations of the types involved here, compel this court to conclude that the PMPA was not invoked by the Northeast transaction because the requirement that either a non-renewal or termination occur was not met.

As plaintiffs point out, the issue of whether Chevron's sale of its northeast marketing assets to Cumberland resulted in non-renewal of franchise agreements between Chevron and its franchisees whose stations were sold was resolved against Chevron in Florham Park I.

Plaintiffs request this court to invoke the doctrine of collateral estoppel to prevent relitigation of this

issue, claiming that the defendants fully (though unsuccessfully) litigated in Florham Park I the identical factual and legal issues they raise here regarding non-renewal versus assignment. Putting to one side plaintiff's request, the substance of the Florham Park I decision must be addressed.

As the Florham Park I court correctly notes, non-renewal means "a failure to reinstate, continue, or extend the franchise relationship ... at the conclusion of the term, or on the expiration date, stated int her relevant franchise." 2 Bus. Franchise Guide (CCH), ¶ 9011 at 6 (D.N.J. 1987) citing 15 U.S.C. § 2801 14(A). The Court's analysis first focuses however, on the PMPA's § 2801(2) definition of "franchise relationship" as the obligations and responsibilities of a franchisor and

franchisee relating to marketing, supply and distribution agreements.

Although this court agrees with the Florham Park I court that "Chevron fail[ed] to extend its franchise relationship with plaintiffs," which resulted in non-renewals "despite any assignment of the leases to Cumberland," 2 Bus. Franchise Guide (CCH) ¶ 9011 at 8, the Florham Park I court overlooked what this court believes is a clear distinction between the § 2801(2) definition of franchise relationship and the use of the term "franchise relationship" in 2802(b)(2)(E).

Senate Report No. 297, 95th Cong. 2d Sess. 30 (1978) states, in part, that "[t]he renewal provisions of the title address the renewal of the relationship between the parties rather than the specific rights or obligations of the parties under the franchise agreement."

(emphasis added). Thus regardless of whether or not the plaintiffs in Florham Park I and the case at bar were afforded protection of their franchise rights as delineated in § 2801 of the PMPA and defined in Senate Report No. 297 at 29, see supra, non-renewal of the franchise relationship between plaintiffs and Chevron could occur as a matter of law. See, Chestnut Hill Gulf, Inc., et al. v. Cumberland Farms, Inc. and Chevron, U.S.A., Inc., C.A. No. 86-3519 at 3 - 5 (E.D.Ma. 1988).

Both the Florham Park I and Chestnut Hill courts refer to the notice sent by Chevron to all Northeast franchisees informing them that Chevron would not renew existing lease and supply agreements, but had assigned these obligations to Cumberland. Although Chevron couched this notice in precautionary terms, i.e., in case it was

claimed that the sale and assignments to Cumberland constituted a non-renewal under the PMPA formal notice of non-renewal was being given Chevron's reason for the assignments urges a finding that non-renewal did occur. Chevron withdrew from marketing through retail outlets in the entire Northeast by its own admission. Indeed, the market withdrawal provision of the PMPA is an explicit affirmative defense to a termination or non-renewal. If Chevron is correct that it completely withdrew from retail marketing in the Northeast, then clearly its relationship with the plaintiffs was, or will be, nonrenewed. See Bruce A. Smith, et al. v. Cumberland Farms, Inc., and Chevron U.S.A. Inc., C.A. No. 87-1001. The fact that plaintiffs were granted continued use of the Gulf trademark and protected in their lease and supply agreements goes only to the

legality of Chevron's market withdrawal under New York State law and section 2802(b)(2)(E), and not to the issue of whether non-renewal occurred in the first place.[2]

Defendants cite several cases in support of their contention that a franchise assignment that is valid under state law can be neither a termination nor non-renewal. This was the holding of May-Som Gulf, Inc. v. Chevron, 2 Bus. Franchise guide (CCH) ¶ 9000, (N.D. Ohio 1987) which recently was affirmed by the Sixth circuit. C.A. No. 87-4085 (6th Cir. 1989). In affirming May Som however, the Sixth Circuit -- without saying it was doing so -- modified the district court's rather bald assertion that no assignment valid under state law may be a termination or non-renewal. The Sixth Circuit adopted the explanation of the Fourth Circuit in Barnes v. Gulf Oil

Corp., 795 F.2d 358 (4th Cir. 1986) that a franchise consists of "three elements: 'a contract to use the refiner's trademark, a contract for the supply of motor fuel to be sold under the trademark, and a lease of the premises at which the motor fuel is sold.'" May Som, 87-4085 at 9 (quoting Barnes, 795 F.2d at 360). It then held that a claim for constructive termination due to assignment of a franchise can be sustained under the PMPA only where the franchisee "prove[s] either: (1) that by making the assignment, the franchisor breached one of the three statutory components of the franchise agreement, ... or (2) that the franchisor made the assignment in violation of state law and thus, the PMPA was invoked." Id. at 10 (emphasis added). Thus under the Sixth Circuit's formulation, as evidenced by its use of the disjunctive, a

constructive termination may occur even where a valid assignment is effected. Reason supports the Sixth Circuit's holding, as the PMPA serves a protective function that may well extend beyond that of a state's laws on assignability of contracts.

Section 2806(b) of the PMPA, which states that "[n]othing in this subchapter authorizes . . . or prohibits any transfer or assignment of any franchise as authorized by ... any applicable provision of state law", does not, as defendants argue, compel a contrary conclusion. This section should be read not to alter the meaning of "nonrenewal" of a franchise relationship, but rather to indicate the applicability of state law to franchise assignments. Defendants cannot be heard to argue that state law validity exempts a transaction from the terms of the PMPA when

2802(b)(2)(E)(iii)(II) explicitly provides that grounds for non-renewal exist "[i]n the case of ... assignment to another person of the franchisor's interest ... if such other person offers." Id. (emphasis added).

The PMPA does not pre-empt state law on the issue of valid assignment, as 2806(b) plainly states. But the PMPA divorces the issue of assignability from that of proper non-renewal in 2802(b)(2)(E)(iii)(II), which imposes conditions for legal non-renewal following an assignment. See Chestnut Hill at 5.[3]

As noted above, Senate Report No. 297, 95th Cong.2d Sess. 30 (1978) states that "[t]he renewal provisions of the title address the renewal of the relationship between the parties rather than the specific rights or obligations of the parties under the franchise agreement."

In light of this pronouncement, separation of the state law assignability issue from that of permissible PMPA non-renewal is necessary and proper. The contractual rights of parties, like the plaintiff are protected, in the first instance, by state law. Non-renewals that occur by way of valid franchise assignments or transfers in the context of a market withdrawal must then meet the strictures of 2802(b)(2)(E). This avoids the problem of wide disparity between states in providing protection against unfair assignment. Regardless of the terms under which the franchise was assigned -- which obviously will vary by state -- the PMPA protections, by not being tied to the valid assignment issue, will be uniform.

This court concludes that Chevron's decision to withdraw from retail marketing in the Northeast led, as a

matter of law, to non-renewal of the plaintiff's franchise relationship with Chevron. This is so regardless of whether or not the franchises were validly assigned to Cumberland, and summary judgment is thus not supportable on this basis.

B. Are Chevron and Cumberland entitled to summary judgment for having complied with the market withdrawal provisions of the PMPA?

Initially it should be noted that Chevron did withdraw from the Northeast market under the plain terms of 2802(b)(2)(E). Despite the fact that Chevron continued its refining activities in Philadelphia and still sells fuel at the wholesale level, it is not marketing through retail outlets in the Northeast and so has withdrawn within the meaning of the PMPA. See, Florham Park I, 2 Business Franchise Guide (CCH) 9011 (D.N.J. 1987) (noting that "Chevron's

licensing of its trademarks to Cumberland Farms is not even 'marketing'" and that although "Chevron motor fuel continues to be marketed in the relevant geographic area[] Chevron ... no longer markets the fuel." Id. at 11.

As noted above, Section 2802(b)(2)(E) of the PMPA permits non-renewal of a franchise relationship when the franchisor withdraws from the relevant marketing area provided that: (1) the franchisor has given proper notice to the affected franchisee(s), (2) the franchise agreements are for a period of at least three years, (3) the franchisor's decision to withdraw has been made in good faith and in the normal course of business, (4) the franchisor's decision to withdraw has been made after the most recent renewal of the franchise agreement and is based on changes in relevant facts and circumstances, and (5) the new

franchisor offers to renew the franchises on terms that are non-discriminatory as compared to other franchise arrangements then being offered by that franchisor.

The first four of these factors will require consideration of Chevron's actions and intentions while the fifth will involve both Chevron and Cumberland. Summary judgment will be granted if drawing all inferences in favor of the non-moving party, ". . . the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Rule 56(e) further provides, in relevant part, that

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response ... must

> set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Electric Industrial Corp. v. Zenith Radio Corp., 475 U.S. 574 (1986).

There is no dispute that the term of each plaintiff's lease was at least three years. As to sufficiency of the notice of non-renewal, plaintiffs assert, without explanation, that they were not given the 180 days required by section 2804 of the PMPA.

Defendants contend and this court agrees, that if plaintiffs are claiming that they received fewer than 180 days notice because only 106 days elapsed between the date notice was given ad the closing, their argument is meritless. Chevron's notices of February 14 stated that non-renewal would occur at the later

of (i) expiration of the dealer's current agreements or (ii) 180 days after the dealer's receipt of the notice.

As the court held in Florham Park I,

> [f]or those plaintiffs whose prior franchises expired more than 180 days after February 14, 1986, proper notice clearly was given. As for those plaintiffs whose prior franchises expired within 180 days after February 14, the notice ... effectively extended the franchise relationship from the original expiration date until 180 days from receipt of the February 14 notice. For these plaintiffs, non-renewal -- failure to extend the franchise relationship -- did not take effect until this later date. Id. at 18,421.

The fact that Chevron delegated its contractual obligations to Cumberland beginning on the closing date does not mean that non-renewal then occurred. Chevron does not mean that non-renewal then occurred. Chevon remained a guarantor under each assigned contract until it expired, effectively preserving its relationship with each franchisee.

Plaintiffs also contest Chevron's assertion that it made its decision to withdraw in good faith, based on changes in relevant facts and circumstances.

Senate Report No. 95-297 provides guidance for evaluating a franchisor's determination to withdraw from a market. Specifically, the report sets forth:

> a two-fold test ... to judge certain specified determinations including that of market withdrawal.
>
> One test is whether the determination was made 'in good faith'. This good faith test is meant to preclude sham determinations from being used as an artifice for termination or non-renewal. The second test is whether the determination was made 'in the normal course of business'....These tests provide adequate protection of franchisees from arbitrary or discriminatory termination or non-renewal, yet avoid judicial scrutiny of the business judgment itself.

Id. at 37.

In support of their claim that issues of material fact exist regarding Chevron's good faith, plaintiffs note

that Chevron rejected a substantially higher offer from Getty for the assets sold to Cumberland. Plaintiffs argue that Getty, an established franchisor, was a more desirable purchaser from the perspective of all effected franchisees but that defendants rejected Getty's bid because Cumberland offered a better benefit package for the employees it took on from Chevron.

Additionally, plaintiffs claim that Chevron's knowledge that Cumberland is a Chapter S private corporation engaged primarily in the realty and convenience store business demonstrates Chevron's bad faith in making the sale. Plaintiffs argue that Chevron's failure to tell them of the impending sale until the final stages of negotiation had been entered was a clear indication that Chevron knew it had compromised the best interests of its franchisees by selling their stations

to a company which might treat the purchase primarily as a real estate investment.

Plaintiffs conclude that Chevron's willingness to complete the sale despite the foregoing circumstances raises a factual question as to whether Chevron made a sham determination to withdraw from the Northeast or acted in good faith.

The court is not prepared to agree with plaintiffs that Chevron's determination to withdraw from retail marketing in the Northeastern United States was an "artifice for ... non-renewal" of their franchises. S.Rep. at 37.

The Gulf acquisition placed Chevron under a heavy debt obligation which it sought to reduce by the Northeast sale. The record is devoid of any evidence of bad faith, or of decisions made in

connection with the Northeast sale other than in the normal course of business. Significantly, the Florham Park I and Florham Park II courts each found that the same withdrawal decision here at issue was made in good faith. The arguments plaintiffs make regarding Cumberland's business interests and the possibility of improper treatment by Cumberland go to the fifth factor of 2802(b)(2)(E) and not to the good faith of Chevron's determination to withdrawal.

Plaintiffs also contend that the fourth requirement of 2802(b)(2)(E)(i)(I) and (II), the decision to withdraw made after the most recent franchise renewal based on changes in relevant facts and circumstances, is not satisfied where, as here, a franchisor's decision is not prompted by a change in marketing conditions or consumer preferences.

Defendants answer that the appearance of a suitable purchaser (Cumberland) was a change in relevant facts and circumstances sufficient to support its withdrawal decision under the PMPA.

Plaintiffs call the court's attention to Senate Report No. 297, which speaks of "changes" and "trends" which "may ... serve as the basis for such a [withdrawal] determination." Id. at 35. In addition, plaintiffs note that in Russo v. Texaco, Inc., 630 F. Supp. 682 (E.D.N.Y. 1986), aff'd, 808 F.2d 221 (2d Cir. 1986) Judge Weinstein stated that "franchisors may initiate changes in their marketing activities to respond to changing marketing conditions and consumer preferences." 630 F. Supp. at 688.

The court is not persuaded, however, that either the Senate Report or Russo is authority for the proposition that

changed market conditions or consumer preferences are the exclusive justifications for a withdrawal determination. Indeed, to so hold would be to prohibit the exercise of sound business judgment in anticipation of market changes. A corporate decision maker's acumen and prescience under such a rule would be rewarded only by his fulfilled expectation of a crippled bargaining posture and consequent losses sustained upon withdrawal in response to the market or consumer preference change. Such a perversity would be indefensible from the perspective of shareholders and could not have been intended by Congress.[4]

In light of the foregoing considerations, this court adopts the view expressed by the Florham II court:

> Congress provided a market withdrawal defense to ensure

> distributors adequate flexibility to respond to changing market conditions.
>
> ***
>
> Although Congress included safeguards so that this defense could not be used unfairly, the withdrawal provision must be interpreted to permit adequate flexibility. Given this intention ... the presence of Cumberland Farms as a willing buyer constitutes the 'change in relevant circumstances' upon which Chevron's withdrawal determination was based.

Florham Park II, at 18,426. (Accord, May-Som I ("[t]he availability of a suitable buyer was, therefore, a changed circumstance upon which Chevron based its decision"). Id. at 18,328. The fifth and final factor of the market withdrawal affirmative defense requires, as noted above, that the purchaser

> of the franchisor's interest ... offer[] in good faith, a franchise to the franchisee on terms ... not discriminatory to the franchisee as compared to franchises then currently being offered by [the purchaser] or franchisees then in effect and with respect to which [the purchaser] is the franchisor. 15 U.S.C. § 2802(b)(2)(E)(iii)(II).

Chevron claims that it satisfied the fifth element of 2802(b)(2)(E) by including in the Asset Purchase Agreement a term, under which Cumberland agreed to render non-discriminatory renewals to the franchisees. This being so, says Chevron, all claims related to bad faith and discriminatory renewals must be asserted against Cumberland alone. The court disagrees. The PMPA clearly and unambiguously states that a franchisor may assert the market withdrawal defense only where the purchaser of his interests "offers, in good faith, a franchise...." 15 U.S.C. § 2802(b)(2)(E)(iii)(II) (emphasis added). The court refuses to reformulate the withdrawal defense by holding it satisfied where a franchisor's purchaser merely agrees to offer good faith, non-discriminatory renewals. Such a ruling would significantly diminish the protections afforded franchisee under the

PMPA and contravene the statutory language and intent. See Florham Park I, 2 Business Franchise Guide (CCH) ¶ 9012 (D.N.J. 1987); Ewing v. Amoco Oil Co., 823 F.2d 1432 (10th Cir. 1987).

Cumberland Farms seeks summary judgment on the issue of its good faith in offering non-discriminatory renewals to the plaintiffs herein. While maintaining that it satisfied the withdrawal defense irrespective of Cumberland's good faith, Chevron joins Cumberland's motion.

The essence of defendants' claim is that plaintiffs are deliberately mischaracterizing Cumberland's actions and intentions in order to persuade the court that Chevron's market withdrawal was illegally accomplished. Plaintiffs' goal, defendants conclude, is to improperly use the PMPA as a "vehicle" by which to purchase their stations.

Defendants argue that the good faith requirement of the PMPA refers not to the objective reasonableness of a franchisor's acts, but to his subjective intent. They describe, as an example of subjective bad faith, a franchisor who is motivated by his desire to terminate a franchise agreement. Defendants claim that plaintiffs have adduced no facts in support of their contention that Cumberland has acted in bad faith within the meaning of the PMPA, and should therefore have summary judgment entered against them on this issue.

In fact, plaintiffs have alleged such facts. Robert M. Quinlan, Vice President of Branded Marketers for Gulf Oil Division of Cumberland Farms, Inc., testified in his deposition that Cumberland owned Gulf stations and convenience store gasoline outlets are billed for fuel under a different pricing

formula than lessee dealers (including plaintiffs). Quinlan acknowledged that the price under this formula for lessees is historically higher.

Cumberland's chief Executive and Chairman, D.B. Haseotes, testified that to increase overall profitability a station could be (and indeed several have been) sold or converted to another use.

Finally, plaintiffs note that the Florham Park II court accepted as evidence an expert's opinion that "based on [a] review of the lease and discovery documents, Cumberland Farms intends to drive dealers out of business and to take over the stations." Id., 2 Business Franchise Guide (CCH) § 9012 (D.N.J. 1987) at 5-6.

As did the Florham Park II court, this court concludes that plaintiffs have raised a triable issue as to whether Cumberland has acted in bad faith and

with discriminatory intent. Although the expert opinion offered in Florham Park II does not refer specifically to Cumberland's dealings with the present plaintiffs, it is reasonable to attach significance to that evidence in light of the additional facts alleged. Interestingly, the conclusion reached by the expert in Florham Park II regarding Cumberland's ultimate goal bears a striking resemblance to defendants' own definition of subjective bad faith.

Drawing all inferences in favor of plaintiffs, it is clear that a triable issue exists as to Cumberland's subjective intentions regarding the Northeast properties in general and the plaintiffs' franchises specifically. Summary judgment is thus denied to Cumberland on this issue, and to Chevron with respect to the fifth factor of 2802(b)(2)(E).[5],[6]

SO ORDERED.

Dated: Brooklyn, New York
June 5, 1989

_____
U.S.D.J.

FOOTNOTES

1. Specifically, § 2802(b)(2) provides, in pertinent part, that:

> [T]he following are grounds for termination of a franchise or non-renewal of a franchise relationship:
>
> (e) In the case of any Franchise ... entered into or renewed on or after [the enactment of the PMPA] (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years of longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if -
>
> (i) such determination -
> (I) was made after the date such franchise was entered into or renewed, and
>
> (II) was based upon the occurrence of changes in relevant facts and circumstances after such date;
>
> * * *
>
> (iii) in the case of leased marketing premises-

(I) the franchisor, during the 180 day period after notification, was given pursuant to Section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which

such other person is the franchisor.

2. Had Chevron not taken appropriate steps to protect the franchise right of its franchisees and thereby run afoul of New York state laws regarding assignment of contractual obligations, plaintiff's argument, assumably, would be that their franchises were constructively terminated not non-renewed. Whether a constructive termination can be cured by a proper market withdrawal in light of Section 2806(b), discussed infra, need not be decided here.

3. It should further be noted that May Som I, on which defendants heavily rely, derived its holding that "[i]f an assignment is valid under state law, it is neither a termination nor a non=renewal" from two cases that provide tenuous support for this proposition. Aldrich v. Amoco Oil Co., Bus. Franchise

Guide (CCH) ¶ 8322 (1985-1986 Transfer Binder) (S.D. Iowa 1985) held only that "[u]nder these facts the court concludes that plaintiff's franchise has not been terminated." Id. at 15,113. The "facts" the Aldrich court found dispositive involved aspects of the franchise relationship as well as assignment of interests, and the case thus offers scant support for the May Som holding. More importantly, McGee v. Gulf Oil Corp., Bus. Franchise Guide (CCH) ¶ 8379 (1985-1986 Transfer Binder) (N.D. Ala. 1985) held that "[t]he PMPA ... leaves the question of assignability to state law, clearly implying that an assignment or transfer of a franchise, by itself, does not constitute a termination." Id. at 15, 348. (emphasis added). This language quoted in defendants' brief, can only be viewed as evidence of the court's recognition that valid assignment does

not negate the non-renewal issue, but is simply divorced from it. The McGee and Aldrich courts are in harmony with the text of PMPA § 2802(b)(2)(E)(iii)(II) and not, as defendants claim, supportive of the May Som I holding that the PMPA requirement of proper grounds for non-renewal is avoided or satisfied by a valid state law assignment standing alone.

4. It may further noted that where a market change does occur franchisees will have gained no benefit by the franchisor's having waited for the downturn. Since the withdrawing franchisor must provide the franchisees the protections of the PMPA and, most notably, the fifth factor of § 2802(b)(2)(E), the franchisee also is not significantly prejudiced by withdrawal

before or even in the absence of a market change.

5. The disposition of this issue makes it unnecessary to consider plaintiffs' arguments that (1) Chevron's market withdrawal was defective because Cumberland was not a franchisor prior to the northeast transaction, and (2) state law provisions mandating certain disclosures were transgressed.

6. The court appreciates and acknowledges the scholarly research of Dale Lois, New York Law School Intern, who researched and drafted this opinion.